STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH WILLIAM MILLER,

Defendant-Appellee.
_____/

Supreme Court No. 149502

Court of Appeals No. 314375

Leelanau Circuit Court No. 12-1777-FH

# REPLY BRIEF OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

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## ARGUMENT

### I. *People v Ream* controls the outcome of this case.

*People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), applied the same-elements test for divining legislative intent from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), and held that the multiple-punishments prong of the Double Jeopardy Clause is not violated if one looks to the elements of two crimes in the abstract and determines that it is possible to commit the first crime without committing the second crime, and also possible to commit the second crime without committing the first crime. 481 Mich at 241.[1]

In their opening brief, the People demonstrated that if one looks to the abstract elements of MCL 257.625(1)(a), and compares them with the abstract elements of MCL 257.625(5), a person may violate subsection 1 without violating subsection 5: the person could drive while intoxicated (thereby violating subsection 1) without causing "serious impairment of a body function" of another person (as subsection 5 requires). It is also true that one can violate subsection 5 without violating subsection 1. This can occur because a conviction under subsection 5 is possible not just if there is a violation of subsection 1, but also for violations of

[1] Resort to the *Blockburger/Ream* test is not necessary if the Legislature expressed a clear intention that multiple punishments be imposed regardless of whether the offenses share the same elements. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007). As noted in § 11.3 of the Michigan Judicial Institute's Controlled Substances Benchbook, the Legislature has expressly authorized multiple punishments in several statutes including MCL 333.7401a, MCL 333.7401c, and MCL 333.7408.

subsection 3 or subsection 8. MCL 257.625(5) ("A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8).").

Miller initially contends that *Ream* is distinguishable because it involved a predicate offense contained in an unrelated statute whereas here Miller was convicted of two crimes listed in the same statute. But there is no indication that *Ream* is so limited. Under *Ream*, one compares the abstract elements of the two crimes to understand the Legislature's intent regardless whether the two crimes are found in two statutes or one.

Miller further argues that when one is dealing with an offense with multiple degrees, such as here, the Court should follow the rule from *People v Wilder,* 485 Mich 35; 780 NW2d 265 (2010), and view the elements in light of the charging theory, i.e., not all possible elements. But *Wilder* did not purport to address whether conviction of two crimes violated the multiple punishments prong of the Double Jeopardy Clause. Instead, *Wilder* addressed the analytically distinct question of whether a lesser conviction was a cognate lesser or a necessarily included lesser offense, which explains why it did not even cite *Ream*. This Court should reject this argument because the statutory elements, not the charging theory or particular facts of the case, are the best indicator of legislative intent. 481 Mich at 238. In any event, how an individual case is charged, or the particular theory of prosecution, is not indicative of legislative intent.

In particular, the decisions in *Ream* and *Wilder* are consonant with one another by reference to the purposes for which each test is applied. *Ream* employs

the *Blockburger* test by examining the statutory elements in the abstract as a tool to understand the Legislature's intention about permitting multiple punishments. *Ream,* 481 Mich at 238 ("Because the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements"). In contrast, the paramount issue in *Wilder* is whether the charged offense places a defendant *on notice* about the elements for which he must defend against. *Wilder,* 485 Mich at 42 ("the trier of fact may not find a defendant not guilty of a charged offense but guilty of a cognate offense because the defendant would not have had notice of all the elements of the offense that he or she was required to defend against"). Thus, the court must examine the charge itself to determine whether the lesser offense includes all of the elements of the charged offense. Each test is appropriate to its function, and *Ream* governs here.

Miller also asserts that the Court should find that driving while visibly impaired and driving with any amount of a schedule 1 substance in one's body is simply an alternative way of proving intoxication. Not so. As for driving while visibly impaired, Miller's argument flies in the face of the fact that driving while visibly impaired is a lesser crime than operating while intoxicated. *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975); M Crim JI 15.4 (describing operating while visibly impaired as "less serious charge" than operating while intoxicated).

As for driving with "any amount" of a schedule 1 controlled substance, Miller's argument ignores the fact that "any amount" may include an amount so

small that it does not lead to intoxication.[2] It must be recalled that a drug is only included in schedule 1 if it has a high potential for abuse and either (1) has no accepted medical use in treatment, or (2) lacks accepted safety for use in treatment under medical supervision. MCL 333.7211. Miller's argument is nothing more than an attempt to have this Court rewrite the statute to strike the words "any amount" and replace them with "an amount sufficient to impair one's driving." The statute must be applied as written, and judicial interpretation is not required or permitted. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). As written by the Legislature, MCL 257.625(8) is a zero-tolerance provision that prohibits driving with "any amount" of a schedule 1 controlled substance in one's body. The statute does not require proof that the amount of a schedule 1 controlled substance had an effect the driver.

## II. *Ream* was correctly decided.

Miller and amicus Criminal Defense Attorneys of Michigan (CDAM) assert that *Ream* was incorrectly decided and should be overruled.

Miller and CDAM claim that *Ream* is contrary to *Harris v Oklahoma*, 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977); *Whalen v United States*, 445 US 684; 100

[2] The People recognize that a different rule applies with reference to a person who is a registered patient under the Michigan Medical Marihuana Act (MMMA) who drives with an amount of marihuana in his system that is so small that he is not "under the influence" of marihuana because the immunities found in the Act supersede MCL 257.625(8). *People v Koon*, 494 Mich 1, 7–8; 832 NW2d 724 (2013). The MMMA supersedes MCL 257.625(8)'s zero-tolerance provision because it expressly resolves conflicts between all other acts and the MMMA by exempting the medical use of marijuana from the application of any inconsistent act. MCL 333.26427(e).

S Ct 1432; 63 L Ed 2d 715 (1980); *Illinois v Vitale*, 447 US 410; 100 S Ct 2260; 65 L Ed 2d 228 (1980); and *Payne v Virginia*, 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 801 (1984). CDAM further argues this Court was required to follow *Harris*, *Whalen*, *Vitale,* and *Payne* because the United States Supreme Court never expressly has overruled them. This argument is based on a fundamental misunderstanding of the situation this Court faced in *Ream*. As the United States Supreme Court has explained, "[b]ecause the substantive power to prescribe crimes and determine punishments is vested with the legislature . . . , the question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent." *Ohio v Johnson*, 467 US 493, 499; 104 S Ct 2536; 81 L Ed 2d 425 (1984). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 US at 366.

Thus, unlike most constitutionally based claims, a claim under the multiple-punishments prong of the Double Jeopardy Clause requires an analysis of state law; because the state legislature has the authority to define and punish crimes, the definition of multiple punishments is dependent on the legislative intent of the state government. *Volpe v Trim*, 708 F3d 688, 696–697 (CA 6, 2013). This Court was not required to apply United States Supreme Court precedent in its effort to discern the intent of the Michigan Legislature. See, *Johnson*, e.g., 467 US at 493, n 8 ("the *Blockburger* test does not necessarily control the inquiry into the intent of a state legislature.") This is because *Blockburger* is merely an aid into divining legislative

intent. See *Jackson v Smith*, 745 F3d 206, 211 (CA 6, 2014) (specifically holding that the state courts are not required to apply *Blockburger* to resolve a double jeopardy claim on the issue of multiple punishments because it is merely a rule of statutory construction, designed to assist courts in discerning Congress's intent).

While this Court has chosen to adopt *Blockburger*'s abstract elements test to help it determine the intent of the Michigan Legislature, when it is not otherwise clear, it was not constitutionally required to adopt the *Blockburger* test, or to apply subsequent United States Supreme Court cases applying *Blockburger* or analyzing multiple-punishment cases. This is because this Court has the final say on what the Michigan Legislature intended. See further *McCloud v Deppisch*, 409 F3d 869, 876 (CA 7, 2005) (federal courts do not have the authority to police a state court's evaluation of a state legislature's intent.) In fact, defendant Ream was denied habeas relief on this very basis. *Ream v Bell*, 2012 WL 860319, at *9 (ED Mich 2012). See also *Galvan v Prelesnik*, 588 F App'x 398 (CA 6, 2014) (rejecting a double jeopardy claim on habeas review for a prisoner convicted of felony-murder and the predicate felony because the Michigan courts had determined the state legislature intended cumulative punishments).

Further, the U.S. Supreme Court cases cited by Miller and CDAM are either no longer good law or are distinguishable.

In *Harris,* the U.S. Supreme Court held in 1977 that the Double Jeopardy Clause precluded the State of Oklahoma from prosecuting a defendant for robbery with a firearm after convicting him of felony murder, when robbery with a firearm

was the underlying felony. 433 US at 682–683. First, this Court specifically discussed *Harris* in *Ream*, 481 Mich at 236, and refused to follow it because it applied the "same conduct" test that was overruled in *Dixon*. *Ream,* 481 Mich at 236–237. Second, *Harris* does not even mention *Blockburger*. Third, *Harris* was a successive prosecution case and not a multiple-punishments case. Successive prosecution cases are analyzed differently because they implicate different protections. See *Brown v Ohio*, 432 US 161, 165–166; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Successive prosecution cases are analyzed differently because of the collateral estoppel aspect of the Double Jeopardy Clause adopted in *Ashe v Swenson*, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970), applies. Thus, the intent of the Michigan Legislature is not relevant in analyzing successive prosecution cases whereas it is controlling in analyzing multiple-punishment cases.

In *Whalen,* the U.S. Supreme Court in 1980 reviewed a District of Columbia statute enacted by Congress and held that the Double Jeopardy Clause prevented federal courts from sentencing a defendant to consecutive terms of incarceration unless each offense required proof of a fact which the other did not. 445 US at 694. First, as with *Harris*, this Court specifically discussed *Whalen* in *Ream* and rejected it because it departed from an abstract approach of applying the *Blockburger* test to the statutory elements as recognized in *Albernaz v United States,* 450 US 333, 338 (1990), and instead applied the test to how the crimes were actually charged. *Ream,* 481 Mich at 236–237. Second, as explained in *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983), *Whalen* is a statutory construction

case and does not establish a constitutional rule. Third, *Whalen* only applies to consecutive sentences. Here Miller's sentences were concurrent.

In *Illinois v Vitale*, the U.S. Supreme Court indicated that double jeopardy may preclude an involuntary manslaughter prosecution of an automobile driver who had previously been convicted for failing to reduce speed to avoid a collision. 447 US at 420–421. CDAM states that the *Ream* Court "overlooked" this case. Again, *Vitale* was a successive prosecution case and not a multiple-punishments case. Therefore, it was irrelevant to this Court's analysis.

Finally, in *Payne v Virginia*, the Supreme Court relied on *Harris* and held in 1984 that the Double Jeopardy Clause prohibited trial of the defendant for the lesser offense of robbery where he had previously been convicted of the greater crime of murder. 468 US 1062. *Payne* is a three-sentence opinion that simply applied *Harris*. The reasons for rejecting *Harris* apply equally to *Payne*.

CDAM further claims that it is impossible to reconcile the *result* in *United States v Dixon*, 509 US 688 (1993) (plurality opinion), with the holding in *Ream*. But this Court cited *Dixon* in its opinion in *Ream*, which certainly suggests it saw no conflict. 481 Mich at 236. Further, it is difficult to cobble together a majority opinion in *Dixon* given the multiplicity of concurrences. Moreover, yet again, *Dixon* was a successive-prosecution case, and not a multiple-punishments case. The CDAM brief overlooks this critical distinction.

## III. The tests for overruling a case set forth in *Robinson v Detroit* are not satisfied here.

Finally, it must be noted that while Miller and CDAM assert that *Ream* should be overruled, neither cites *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), or attempts to show that the test for overruling precedent is met here.

*Robinson* sets forth a multi-factored test that this Court applies before overruling a precedent. The Court first determines if the case was wrongly decided. If yes, the Court then applies a three-part test to determine whether the doctrine of stare decisis nonetheless supports upholding the previously decided case. The Courts reviews (1) whether the decision defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision.

Here, neither Miller nor his amicus has established the *Ream* was wrongly decided.[3] Further, *Ream* does not defy practical workability. In fact, *Ream* is quite easily applied. Application of the *Blockburger/Ream* abstract elements test leads to a consistent interpretation of legislative intent that keeps the statutory language creating the offenses at the forefront of the analysis.

As for reliance interests, prosecutors have relied on *Ream* in making charging decisions. Finally, no changes in the law or facts have occurred since *Ream* was decided in 2008 that would somehow undermine the propriety of *Ream*.

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[3] *Ream* was most recently cited with approval by the South Dakota Supreme Court in *State v Garza*, 2014 SD 67; 854 NW2d 833, 841 (2014) (holding felony-murder and first-degree arson are not the same offense for the purpose of cumulative punishment analysis).

## CONCLUSION AND RELIEF REQUESTED

The Court of Appeals' decision vacating Miller's conviction and sentence for violating MCL 257.625(1), as a third offense, should be reversed because the multiple-punishments prong of the Double Jeopardy Clause was not violated when the jury convicted Miller of operating while intoxicated, MCL 257.625(1)(a), and operating while intoxicated or visibly impaired causing serious injury to another person. MCL 257.625(5). Miller should be held fully accountable for his crimes. Consequently, this Court should reinstate Miller's MCL 257.625(1)(a) conviction and sentence as a three-time drunk driver, MCL 257.625(9)(c).

Respectfully submitted,

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